DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 98-000001
Indiana Solid Waste Disposal Fee
For the Period 1994-1995

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ISSUES

I. Solid Waste Disposal Fee – Estoppel

Authority: 45 IAC 15-3-2; West Pub. Co. v. Indiana Department of Revenue, 524 N.E.2d 1329 (Ind.Tax 1988); Video Tape Exchange v. Ind. Dept. of State Revenue, 533 N.E.2d 1302 (Ind.Tax 1989); Walgreen Co. v. Gross Income Tax Division, 75 N.E.2d 784 (Ind. 1947).

Taxpayer protests the Department's assessment of the solid waste disposal fee.

II. Tax Administration – Penalty and Interest

Authority: IC 6-8.1-10-2.1; 45 IAC 15-11-2; IC 6-8.1-10-1

The taxpayer protests the assessment of a negligence penalty and interest.

STATEMENT OF FACTS

The taxpayer was the operator of a solid waste landfill (when necessary, hereinafter referred to as City of X Sanitary Landfill). The landfill was owned by an Indiana city (hereinafter referred to as "City X").

I. Solid Waste Disposal Fee – Estoppel

DISCUSSION

The taxpayer states that it operated the landfill at the "specific request of and as a favor to the then Mayor of [City X] … from November 1994 until December 1995." The taxpayer further states the following:

- Taxpayer was requested by the Mayor to operate the landfill "due to emergency circumstances resulting from the indictment of the prior operator on various criminal charges related to the operation" of the landfill (thus leaving the landfill without an operator);

- That given the "immediate need of covering up the waste" and "other immediate actions," the taxpayer was "immediately behind in the various tasks necessary to properly operate" the landfill;

The taxpayer has two arguments regarding the solid waste disposal fee: (A) that the taxpayer relied on the alleged oral statements of a Department of Revenue employee (hereinafter John Doe) and therefore, per the taxpayer, the "Department should be estopped from recovering the assessments"; and (B) that the taxpayer "operated the landfill at the complete discretion of and direction of the Mayor, the assessments, if the same are found to stand, and any penalties, if not waived, and interest should be properly collected from the [City of X]…."

With regard to (A) above, the taxpayer states that it was erroneously instructed on how to fill out the SW-100 by John Doe. The taxpayer describes the timeline of events as follows. In January 1995 a letter (dated January 20, 1995, from John Doe, Special Tax Division of the Department of Revenue, and addressed to the City of X Sanitary Landfill) was received by the taxpayer. The letter stated that all solid waste final disposal facilities in Indiana had to file a SW-100 form by the tenth of each month. The letter noted that no SW-100 for November 1994 had been received by the Department. At this point, in order to explicate the taxpayer's argument, the following extensive quotations will be necessary:

> This was a new and unique issue for [the Taxpayer] since [Taxpayer] had just organized to operate the [City of X Sanitary Landfill]. In order to comply with the request in the letter from [John Doe], [Taxpayer's office manager] called [John Doe], on February 10, 1995, to explain that [Taxpayer] was just setting up a method of operation, that the Form SW-100 would be submitted soon and to obtain instruction on the completion of the Form SW-100 in anticipation of becoming fully compliant.

And:

> In a direct conversation with [Doe] on February 10, 1995, [Taxpayer's office manager] learned how to complete the Form SW-100 after [Doe] went through the Form SW-100, line-by-line ….

And further:

> …because of what seemed like odd wording in Line 1 of the Form SW-100, [Taxpayer's office manager] asked [Doe] whether Line 1 required an entry by tons or by units. [Doe] specifically advised [Taxpayer's office manager] that Line 1 of the Form SW-100 did not need to be completed and that only Line 2 needed completion since every vehicle coming in and out of the Landfill was weighed on a qualified scale by [Taxpayer], regardless of weight.

Finally, the taxpayer states that it—

> began reporting exactly as it was instructed by [Doe] and continued to report each month in good faith in the same manner until [the Mayor of City X] abruptly forced [Taxpayer]

> out of the [City of X Sanitary Landfill] when [Taxpayer] refused to accept a partner in the Landfill."

To buttress its case that the Department should be estopped, the taxpayer provides an affidavit by the office manager, and also telephone records that purport to establish that the office manager spoke with John Doe.

Before unpacking the elements of estoppel, it is worth noting that the alleged conversations between the office manager and John Doe were *oral*. That fact is salient because the Department's regulations state in part:

> *Oral* opinions or advice will *not* be binding upon the department. However, taxpayers may inquire as to whether or not the department will make a ruling or determination based on the facts presented by the taxpayer. If the taxpayer wishes a ruling by the department, the formal request must be in writing. A taxpayer may also *orally* receive technical assistance from the department in preparation of returns. However this advice is advisory only and is *not* binding in the latter examination of returns. (*Emphasis added*)

45 IAC 15-3-2(e). The Department's position is that since the alleged advice was oral (via telephone), the Department is not bound under 45 IAC 15-3-2(e). The taxpayer did not avail itself of the proper procedures for a binding opinion. That said, even if the Department accepted the taxpayer's facts *arguendo*, the taxpayer does not meet the elements of estoppel. In West Pub. Co. v. Indiana Dept. of Revenue, 524 N.E.2d 1329 (Ind.Tax 1988), the court cited the following necessary elements for estoppel:

> (1) A representation or concealment of material facts;
> (2) made with knowledge of the facts;
> (3) and made to a party ignorant of the facts;
> (4) which was made with the intention that the other party would act on it;
> (5) which induces the other party to act.

Id. at 1334 (quoting State ex rel. Crooke v. Lugar, 354 N.E.2d 755 (Ind.App.1976)). 45 IAC 15-3-2(e) touches upon many of the elements of estoppel. For instance, it goes to element number (1) above. A representation was not made given the fact that the Department has made it publicly known (through the regulation) that oral statements by Departmental employees are not binding and should not be seen as binding. The taxpayer either knew of 45 IAC 15-3-2(e), or if it was not aware of it, then it was negligent (ignorance of Indiana's tax laws and regulations is negligence on the taxpayer's part). The regulation also goes to elements (4) and (5), since the office manager knew (or should have known) that "oral opinions or advice will not be binding on the department" yet claims that the oral opinion is what induced the taxpayer to not fill out line 1 of the SW-100. It is not, however, reasonable to believe that the taxpayer relied on John Doe's alleged oral statements. The Department, via 45 IAC 15-3-2, has in essence given advance notice to taxpayers that oral statements are not to be construed as representations nor should oral statements induce taxpayers to act. The purported oral statements by John Doe cannot change the fact that 45 IAC 15-3-2(e) clearly states that oral advice is not binding.

It also is unclear, even on a reading of the facts favorable to the taxpayer, whether the taxpayer was induced to act as required by element (5). In West the court noted that,

> [T]here is no evidence that West in any way changed its position in reliance on Hunt's [a state employee] letter. This is not a case where West paid the tax and then, upon reviewing Hunt's letter, ceased paying. On the contrary, West paid no tax before receiving the letter, and, until the Department initiated the present proceedings, West paid no tax after receiving the letter. There is nothing which indicates that, but for the letter, West would have paid the tax. In short, West has totally failed to demonstrate reliance.

West at 1334. In the present case the taxpayer was not filling out the SW-100 prior to the letter from John Doe. After the purported telephone conversations with John Doe (beginning on February 10, 1995) the taxpayer was still not filling out line 1 on SW-100. That is to say, before the February 10, 1995, telephone call line 1 of the SW-100 was not filled out; after the telephone calls line 1of the SW-100 was not filled out. Thus, like in West, there is nothing to show "but for" the telephone calls initiated by the taxpayer's office manager that the taxpayer would have filled out line 1 of the SW-100.

It is clear that the taxpayer cannot prevail on its estoppel argument. First, the taxpayer bears the burden to establish all of the facts necessary to constitute estoppel (*See* Video Tape Exchange v. Ind. Dept. of State Revenue, 533 N.E.2d 1302, 1305 (Ind.Tax 1989)). The taxpayer has not shown clear evidence as to the five elements of estoppel (for example: we earlier assumed, for arguments sake, that the conversations between the office manager and John Doe were about line 1 of the SW-100, and we assumed, again for the sake of argument, that the office manager gave true and accurate information of all the material facts, and that nonetheless John Doe gave erroneous information to the office manager. But none of these facts was shown by the taxpayer—our earlier discussion was merely *arguendo*). Additionally, "estoppels against the state are disfavored" as the court in West noted. Id. at 1333. Finally, as the Indiana Supreme Court held long ago—

> The taxing authorities of the state during the period mentioned, could not by failing to do their duty, or by any act or failure to act, waive the right and the duty of the state to assess and collect the taxes ….

Walgreen Co. v. Gross Income Tax Division, 75 N.E.2d 784, 787 (Ind. 1947).

Turning to (B), the taxpayer makes a couple of different arguments to the effect that the City of X should pay any deficiencies. First the taxpayer argues that the Mayor of City X mandated to it that "all citizens of X … entering the landfill for the purpose of depositing their household items/refuse were to do so at 'No Charge.'" Thus "[n]o money in the form of charges or taxes were solicited or collected from these people pursuant to the instruction of [the Mayor of City X]." Regardless of whether the mayor did or did not mandate to the taxpayer the "no charge" rule, the fact of the matter is that it does not absolve the taxpayer from its duties and responsibilities. The Mayor of City X cannot relieve the taxpayer of its obligations under Indiana tax law. The second argument is that the Department of Revenue "may require the owner or operator of a Landfill to file a surety bond. The Department of Revenue did not require

a bond of [Taxpayer] but may have required a bond from the City of [X] as the owner of the [City of X Sanitary Landfill]." The statute dealing with surety bonds read in pertinent part as follows for the years 1994 and 1995:

> The department of state revenue *may* require a registrant . . . to file a surety bond ….

IC 13-9.5-5-3.2 (*Emphasis added*. IC 13-20-22-5, which replaced IC 13-9.5-5-3.2, also states that "The department of state revenue may require a registrant . . . to file a surety bond ….").
It does not take much parsing of the statute to realize that the word "may" simply means "optional or discretional" (*See* Black's Law Dictionary, Abridged 6th Edition). Any surety bond was not mandatory—it was the Department's choice. (Also, a surety bond does not go to the substantive issue of whether a liability is owed or not, it simply is an additional mechanism the Department can choose to avail itself of to insure payment. As the statute further notes, the state is the "obligee").

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Penalty and Interest

The taxpayer protests the imposition of the ten percent (10%) negligence penalty. The Indiana Code section 6-8.1-10-2.1 imposes a penalty if the tax deficiency was due to the negligence of the taxpayer. Department regulation 45 IAC 15-11-2(b) states that negligence is "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer."

Subsection (d) of IC 6-8.1-10-2.1 allows the penalty to be waived upon a showing that the failure to pay the deficiency was due to reasonable cause. To establish this the "taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed . . . ." 45 IAC 15-11-2(c).

The taxpayer paints a picture that is at cross-purposes with "ordinary business care and prudence" when it states that it was "immediately behind in the various tasks necessary to properly operate" the landfill, and when it characterizes the business as a rather impromptu "favor to the then Mayor of [X]." The taxpayer argues that this was an industry in a "nascent" state, but solid waste disposal, unlike videocassette rental in the early 1980's, can hardly be characterized as a new industry. The letter from John Doe was dated January 20, 1995, and references a law that was four years old ("Effective January 1, 1991, the State Solid Waste Management Law requires that all Solid Waste Final Disposal Facilities in Indiana file a form SW-100, Solid Waste Disposal Fee Return, by the tenth of every month"). Given these facts—taxpayer's characterization of the operation of the business, the fact that this was not a nascent industry, that the law had been on the books for four years—the taxpayer has not met its burden to show that the penalty should be waived.

(The taxpayer also makes a similar estoppel argument with regards to the penalty—*viz.*, an oral telephone conversation between the taxpayer's office manager and John Doe during which Mr.

Doe allegedly waived any penalties. That argument fails for the same reason that the above estoppel argument failed—see Roman numeral **I**).

The taxpayer also protests the imposition of interest. Pursuant to IC 6-8.1-10-1(e) the Department may not "waive the interest imposed under this section."

FINDING

The taxpayer's protest is denied.

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